84-817

No. _____

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

PAUL F. FOX and MORRIS S. EXLER on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corporation and who while employees obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement,

Petitioners,

vs.

CONSOLIDATED RAIL CORPORATION, themselves and on behalf of all other railroads comprising the National Carriers' Conference Committee and participating in the National Supplemental Sickness Benefit Plan issued by Provident Life and Accident Insurance Company.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Question Presented

Whether the federal courts have, or should exercise, authority to reopen suits by private citizens brought under federal law and settled in the state court where the grounds asserted for relief are that a federal statute was not respected in completing the agreement that terminated the state court action.

TABLE OF CONTENTS.

	Page
Question Presented	i
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of Case	4
Reasons for Granting the Petition	8
Conclusion	15
Appendix A—Opinion of the Court of Appeals	1a
Appendix B—Judgment of the Court of Appeals	17a
Appendix C—Petition for Rehearing	19a
Appendix D—Memorandum Opinion of the District Court	21a
Appendix E—Judgment Order	30a
Appendix F—Complaint—Class Action	32a
Appendix G—Motion of Defendant Consolidated Rail Corporation to Dismiss the Complaint for Failure to State a Claim on Which Relief May Be Granted	44a

Page

TABLE OF CASES.

Bay v. Western Pacific Railroad Co., 595 F.2d 514 (9th Cir. 1979) 5,6,13,14
Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984) 14,15
Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) 7,8,9,10
Duncan v. Thompson, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942) 7,11,12
Fullerton v. Monongahela Connecting Railroad Co., 242 F.Supp. 622 (W.D. Pa. 1965) 5,6,13,14
Hogue v. Southern Railroad Company, 390 U.S. 516 (1968) 11
Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952) 9
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) 8,9,10
Napier v. Chesapeake & Ohio Railroad Company, 582 F.2d 1344 (4th Cir. 1978) 11
Russo v. Matson Navigation Company, 486 F.2d 1018 (9th Cir. 1973) 14,15
Zayatz v. Southern Railway Company, 26 So.2d 545 (1946) *cert. denied*, 329 U.S. 789, 67 S.Ct. 353 (1946) 12,13

Page

STATUTES.

45 U.S.C. §51 ..... 2,3,4,6,7, 8,10,11,14
45 U.S.C. §55 ..... 3,4,5,6,7,8,10, 11,12,13,14

RULES.

Federal Rules of Civil Procedure:
Rule 12(b)(6) 5
Rule 12(d) 4

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No. _____

PAUL F. FOX and MORRIS S. EXLER on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corporation and who while employees obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul F. Fox and Morris S. Exler, on behalf of themselves and all other similarly situated persons, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered August 23, 1984.

Opinions Below

The Opinion of the Court of Appeals (Appendix A, *infra*, 1a-16a) is reported at 739 F.2d 929 (1984). The Opinion of the District Court (Appendix D, *infra*, 21a-29a) is reported at _____ F.Supp. _____.

Jurisdiction

The judgment of the court of appeals (Appendix B, *infra*, 17a) was entered on July 20, 1984. A Petition for rehearing was denied on August 23, 1984 (Appendix C, *infra*, 19a-20a). The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Statutory Provisions Involved

§51. Liability of common carriers by railroad, in interstate of foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States of Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate of foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating of the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) as the same has been or may hereafter be amended.
(April 22, 1908, ch 149, §1, 35 Stat. 65; Aug 11, 1939, ch 685, §1, 53 Stat. 1404.)

§55. Contract, rule, regulation, or device exempting from liability; setoff

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.
(Apr. 22, 1908, ch 149, §5, 35 Stat. 66.)

Statement of Case

This is a Federal Employers Liability Act (FELA) claim brought by Petitioners on behalf of themselves and others similarly situated in the proposed class action, under 45 U.S.C. §51, *et seq.*[1] Petitioners sought recovery from Consolidated Rail Corporation and other railroads comprising the National Carriers' Conference Committee, of supplemental sick benefits setoffs required by the railroads from settlements and/or awards made on claims under the FELA. Petitioners contend this conduct in requiring setoffs violates the prohibition of 45 U.S.C. §55 that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." The complaint sought damages for those setoffs, and a court order that Conrail be permanently enjoined from requiring future setoffs of such liens from settlements and awards. Conrail filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court entered a judgment order granting Conrail's motion. A divided court of appeals panel affirmed, but held only that as the Petitioners originally filed their claims in the state court, they should return to the state court for relief.

1. The Petitioner Paul F. Fox, while an employee of Conrail, was injured while in the performance of his duties, in three separate accidents, the last occurring on January 18, 1978. Fox filed three separate actions in State Court which were settled in the total amount of Seventeen Thousand ($17,000.00) Dollars, from which Conrail required a setoff for the Provident Insurance

[1] A motion for class certification was pending before the District Court at the time of entry of the judgment order (See Appendix, Page 21a-22a) entered pursuant to Petitioners' request for a preliminary determination of defense under Rule 12(d) of the Federal Rules of Civil Procedure.

Company supplemental sick lien in the amount of One Thousand ($1,000.00) Dollars. The sum of One Thousand ($1,000.00) Dollars did not represent premiums paid by Conrail to obtain the insurance, but actual benefits paid by the insurance company. However, the setoff required by Conrail was not returned to the insurance company, but was entirely retained by Conrail.

The Petitioner Morris S. Exler was injured on April 26, 1976, while an employee of Conrail acting within the scope of his employment. He also filed an action in state court and attained a settlement of Fourteen Thousand ($14,000.00) Dollars from which a deduction for supplemental sick benefit in the amount of Two Thousand Ninety-Four and 34/100 ($2,094.34) Dollars was setoff by Conrail. The amount of the setoff was not refunded to the insurance carrier, but was in fact entirely retained by Conrail.

Petitioners believe, and averred in their complaint, that on all FELA claims filed by employees of Conrail similarly situated to Petitioners, that Conrail routinely and systematically setoff the supplemental sick benefit from settlements and retained those sums.

2. Conrail filed a motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint on the grounds that it failed to state a claim upon which relief could be granted. The district court granted the motion, relying on *Bay v. Western Pacific Railroad Co.*, 595 F.2d 514 (9th Cir. 1979) and *Fullerton v. Monongahela Connecting Railroad Co.*, 242 F.Supp 622 (W.D. Pa. 1965), and holding that §55 of the FELA does not create a civil cause of action. The court found "this is an appropriate case for dismissal because the statutory provisions upon which

plaintiffs base their claims (§55) cannot serve as the basis for a private cause of action" (*id.*, at 26a).

3. A divided panel of the court of appeals affirmed, and the petition for rehearing was denied. However, in affirming, the court of appeals did not hold that there was no claim upon which relief could be granted, but only that the Petitioners "having elected to proceed in the first instance in a state court, it is to that court that these appellants (Petitioners) must return for any relief to which they may be entitled" (*id.*, at 9a).

In so holding, the court of appeals, without squarely addressing the issue, apparently disagreed with the district court ruling, that the complaint failed to state a claim on which relief could be granted, at least in cases originally filed in federal court as opposed to state court. The court of appeals said "a federal court has the inherent power to enforce and to consider challenges to settlements entered into in cases originally filed therein. Typically, the court does this without inquiring into, or requiring, an independent basis of subject matter jurisdiction for the enforcement/challenge suit" (*id.*, at 8a).

Judge Weis dissented to the majority decision of the court of appeals (Appendix A, *infra*, 9a-16a), concluding the district court erred in dismissing the complaint, saying *Bay* and *Fullerton* are distinguishable from the present case as the plaintiffs in *Bay* and *Fullerton* sought relief beyond that available under §51. Their claims were not for damages attributable to physical injuries caused by railroad negligence. Judge Weis stated, "In contrast to *Bay* and *Fullerton*, plaintiffs (Petitioners) in this case do not seek damages separate and apart from, or in addition to, those available for the personal injuries covered by Section 51" (*id.*, at 11a). He

went on to state that the fact the Petitioners claims "are within the scope of the Act is further evidenced by the repeated instances in which similar challenges have been brought in Section 51 actions. Instead of directly challenging the settlement, plaintiffs (Petitioners) could have brought a personal injury action under Section 51. The railroad's defense of settlement could then be countered, as in *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942), with the allegation that the settlement violated Section 55."

In refuting the majority decision that Petitioners should return to the state court in a case where even the majority recognized that federal jurisdiction exists, Judge Weis reviewed the doctrine of abstention and said the principles of *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) are not applicable, nor are considerations of wise judicial administration present as to find exceptional circumstances mandating surrender of federal jurisdiction.

Reasons for Granting the Petition

This case presents an important and recurring question concerning the restrictions placed on railroads by Section 55 of the FELA to make effective the liability provision of §51 of the Act, and the ability of federal courts to enforce those sections in actions filed and settled in state courts. Absent the grant of this petition, Conrail's conduct in requiring setoffs will remain unchecked, and at best will result in piecemeal enforcement by individual litigants with potentially inconsistent results and a loss of judicial economy. To return to state court is an inadequate remedy.

As Chief Judge Aldisert, writing for the majority stated, "In this case of first impression, we must decide whether Plaintiffs have presented a claim for which relief could be granted in seeking to have a federal district court reopen Federal Employers' Liability Act cases originally brought, and thereafter settled in the Pennsylvania State Courts" (*id.*, at 1a-2a).

1. The three bases of abstention for federal courts, set forth in *Colorado River Water, supra,* are not applicable here, and those three basis were reaffirmed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L. Ed 2d 765 (1983) when the Court said, 103 S.Ct. at 942, "the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justification' . . . to justify the surrender of [federal] jurisdiction." Exceptional circumstances and the clearest of justification to warrant surrender of federal jurisdiction to the state courts do not exist in this case, and in fact, the totality of circumstances mandate retention of jurisdiction as, (a) the state court, in the cases of the named Petitioners was no longer involved as

the cases had been settled and discontinued; (b) the Petitioners could have employed other procedures to bring the matter before the federal court, as recognized by Judge Weis in his dissent (*id.*, 12a); and (c) this action is a proposed class action, the prospective members of which would include claims settled without suit, suits filed in federal court, and suits filed in state court. Further, the complaint sought relief for employees by enjoining the railroad's conduct in requiring set-offs in future settlements.

2. The court of appeals did not abstain based on any of the three bases, set forth in *Colorado River Water, supra*, and, in fact, none of these bases exist in the present case, as the issue of the validity of a settlement is a matter of federal law and restraint of state proceedings is not sought. In support of their abstention, the majority misapprehended the importance of the very narrow fourth category articulated by this court in *Colorado River Water, supra*, and *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S.Ct. 219, 96 L. Ed. 200 (1952), which is based on considerations of judicial economy and comprehensive disposition of litigation. While judicial economy may be considered, the pendency of a state proceeding is generally no bar to proceedings concerning the same matter in federal court and reasons to abstain must be weighed against the "unflagging obligation" of the federal court to exercise its jurisdiction. *Colorado, supra*, 425 U.S., at 817, 96 S.Ct. at 1246.

3. The court of appeals decision is contrary to the holding of this court in the recent case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 103 S.Ct. 927, 74 L. Ed. 2d 765 (1983) where the court said, "When a district court decides to dismiss

or stay under *Colorado River* it presumably concludes that the parallel state court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all." *supra*. 460 U.S. at 19, 1035 S.Ct. at 943.

Clearly in this case, as the dissent of Judge Weis recognized, no parallel action was pending in the state court. The personal injury suits that were instituted by Petitioners were dismissed. Therefore, no adequate vehicle for complete and prompt resolution of the issues between the parties, including the prospective class members, exists in the state court. The present action is the only vehicle that will result in the avoidance of piecemeal litigation.

4. Petitioners claimed that this act of setting off the sick lien benefits, which is routinely and systematically done by Conrail on *all* employee claims under §51 of the FELA, constitutes a clear violation of §55 of the FELA and works to deprive the employee of the damages to which he/she was entitled to receive under §51 of the FELA.

Section 51 of the FELA confers the right of a cause of action upon an injured employee to recover damages for the injuries which occur while he is employed by a railroad. Section 55 of the FELA voids any contract, rule, regulation or device whatsoever, the purpose or intention of which enables the railroad to exempt itself from liability under §51. Petitioners claimed that Conrail's insistence on the setoffs for the supplemental sick lien benefits paid to the Petitioners is a violation of §55 and has resulted in the Petitioners being denied their full recovery as mandated by §51.

Petitioners had viable claims under §51 of the FELA and had, in fact, achieved settlements under their respective state actions brought under §51. However, because of Conrail's insistence on the setoff, the Petitioners did not receive the full recovery they were entitled to under federal statute for their personal injury claims. Therefore, this action concerns a dispute involving federal law over the settlement of a personal injury claim whereby the Petitioners wish to complete the recovery allowable under §51 by challenging the setoff to the settlement of their claims as a contravention of §55.

5. The policy of the FELA is to provide railroad employees a right to recover just compensation for their injuries negligently inflicted by their employers. *Hogue v. Southern Railroad Company,* 390 U.S. 516, 518 (1968). As the general policy of §51, as decided by this Court in *Hogue,* is to give employees "just compensation," the Petitioners claim is within the scope of §51 because the setoffs worked to deprive the Petitioners of their just compensation. That the claims of the Petitioners are within the scope of §51 and have the right to redress, is further evidenced by the holding in *Napier v. Chesapeake & Ohio Railroad Company,* 582 F.2d 1344 (4th Cir. 1978). In *Napier* the Court left open the possibility that an employee would not be bound to an unfair settlement agreement, and would have a cause of action under §51.

The Petitioners' case is also analogous to the factual and legal circumstances of *Duncan v. Thompson,* 315 U.S. 1, 62 S.Ct. 422, 86 L. Ed. 575 (1942). Duncan was injured while on the job when he fell from a locomotive. Sixteen months later, while still recovering from his injuries and in need of money, he received Six Hundred ($600.00) Dollars from the railroad for living and other

expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of this claim. He signed a document so designating the monies and further requiring that in the event Duncan elected to bring suit for his injuries that he first repay to the railroad the Six Hundred ($600.00) Dollars. Duncan did file suit without returning the Six Hundred ($600.00) Dollars and the railroad entered a defense that the action was premature since Duncan did not return the monies. Duncan responded that to require the return of the monies prior to the suit being instituted was in violation of §55. The trial court held the agreement did not bar suit, but permitted a deduction of Six Hundred ($600.00) Dollars from the verdict awarded to Duncan by the jury. The railroad appealed and the Court of Appeals of Missouri reversed on the basis that the section did not extend to contracts made after the employee was injured. This Court, on certiorari reversed the court of appeals decision, having determined that the agreement, if valid, would be a device that effectively would exempt the railroad from further liability under the FELA. There the claimant was permitted to have the judge and jury assess the impact of the payment in limitation language of the instrument upon his right to seek judicial redress.

6. The court of appeal's decision in the instant case prevents Fox and Exler, and untold other claimants in the prospective class, from having a determination as to whether the railroad has a right to setoff the sick lien payments, even though this Court, in *Duncan*, acknowledged §55 is of fundamental importance in the administration of FELA claims.

This Court has also allowed to stand a decision of the Supreme Court of Alabama when it refused certiorari in the case of *Zayatz v. Southern Railway Company*, 26 So.

2d 545 (1946) *cert. denied*, 329 U.S. 789, 67 S.Ct. 353 (1946). By denying certiorari the Supreme Court left standing the procedure affirmed by the Supreme Court of Alabama wherein, under the Declaratory Judgment Act of Alabama, the trial court was asked by the railway company to determine the validity of a release executed by an employee. The employee demurred, contending that the proceedings seeking a declaratory judgment and an injunction, violated §55 of the FELA. The court denied the defenses of the employee and overruled his demurrer and made a determination of the validity of the release. The form of relief, that is, a determination by the Alabama trial court prior to institution of a civil action under the FELA by the employee as to whether a particular release or payment was a prohibited device under §55 of the FELA, is analogous to the relief requested in the complaint filed by Exler and Fox on behalf of themselves and others similarly situated. Exler and Fox requested a determination of whether the setoff requested was a §55 device, and if so, for the court to enjoin Conrail from requiring future setoffs. Neither the district court, in granting the motions to dismiss, nor the court of appeals in affirming addressed in any way the issue of the request for temporary and permanent injunctive relief or the rights of the prospective members of the class.

7. The court of appeals did not address the issue of the district court's interpretation of, and misapplication and misapprehension of, the facts and holdings of the two cases on which the court heavily relied, *Bay v. Western Pacific Railroad*, 595 F.2d 514 (9th Cir. 1979), and *Fullerton v. Monongahela Connecting Railroad*, 242 F.Supp. 622 (W.D. Pa. 1965).

Bay and *Fullerton* are distinguishable from the Petitioners' case. Unlike the situation presented here, the Plaintiffs in *Bay* and *Fullerton* sought relief beyond that available under §51. Their claims were not for damages attributable to physical injuries caused by the railroad's negligence, as are the claims in Petitioners' case. In *Fullerton*, the damages sought by the Plaintiff were for defamation of character, emotional distress, and invasion of privacy. The court of appeals in *Fullerton* concluded that the claims were not based on negligence and therefore did not come within the scope of §51.

The Plaintiff in *Bay* also did not seek a recovery for a work related injury. There the plaintiff instituted an action alleging a cause of action based upon section §55, contending in part that his discharge constituted a device by which the railroad sought to exempt himself from FELA liability, and that §55 provided a private cause of action to an employee so victimized.

Petitioners in this case do not seek damages separate and apart from, or in addition to, those properly recoverable for their personal injuries under §51. Petitioners' position is that they did not receive the full amount of damages set by §51 for the personal injuries they suffered as a result of the railroad's negligence, because the settlement violated §55.

That the setoffs are in contravention of §55 is supported by two recent circuit court decisions, *Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984); *Russo v. Matson Navigation Company*, 486 F.2d 1018 (9th Cir. 1973).

In *Clark* and *Russo*, the employees appealed a decision which allowed their employer to deduct from the damages awarded the amounts of insurance benefits paid to the employees. In these cases, the Courts held that the insurance benefits received by the employees could not be setoff from the damages recoverable if the insurance is written to cover only those injuries incurred on the job for which the employer might be liable, *i.e.*, where the insurance is for the sole benefit of the employer. As these benefits cannot be characterized as a fringe benefit given employees, these amounts could not be setoff. It is Petitioners' position that the supplemental sick lien benefits provided by Provident are for the benefit of the employer and are not a fringe benefit.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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BRENNAN, ROBINS & DALEY
Attorneys for Petitioners

APPENDIX A

Opinion of the Court of Appeals

FOX v. CONSOLIDATED RAIL CORP.
Cite as 739 F.2d 929 (1984)

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[929] Paul F. FOX and Morris S. Exler on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corp. and who while employees obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement, Appellants,

v.

CONSOLIDATED RAIL CORPORATION, themselves and on behalf of all other railroads comprising the National Carriers' Conference Committee and participating in the National Supplemental Sickness Benefit Plan issued by Provident Life and Accident Insurance Company, Appellee.

No. 83-5666.

United States Court of Appeals,
Third Circuit.

Submitted Under Third Circuit Rule 12(6)
April 27, 1984.

Decided July 20, 1984.

Plaintiffs appealed from an order of the United States District Court for the Western District of Pennsylvania, Alan N. Bloch, J., which refused to reopen Federal Employers' Liability Act cases originally brought and

thereafter settled in Pennsylvania state courts. The Court of Appeals, Aldisert, Chief Judge, held that District Court properly refused to reopen, by a collateral means, private lawsuits brought and settled in state court system where ground asserted for relief was not a denial of constitutional rights, but rather, an assertion that in completing the agreement that terminated the state court actions brought under Federal Employers' Liability [930] Act, that federal statute was not respected; having elected to proceed in the first instance in a state court, it was to that court that those plaintiffs must return for any relief to which they may be entitled.

Affirmed.

Weis, Circuit Judge, filed dissenting opinion.

1. Federal Courts—421

Even though Federal Employers' Liability Act provides for concurrent state and federal court jurisdiction, the substantive affects of such litigation are governed by federal law. Federal Employers' Liability Act, §6, as amended, 45 U.S.C.A. §56.

2. Employers' Liability—1

Federal Employers' Liability Act should be construed liberally for the protection of railroad employees. Federal Employers' Liability Act §1 *et seq.*, as amended, 45 U.S.C.A. §51 *et seq.*

3. Compromise and Settlement—19(1), 21

Federal court has inherent power to enforce and to consider challenges to settlements entered into in cases originally filed therein.

4. Courts—509

District court properly refused to reopen, by a collateral means, private lawsuits brought and settled in state court system where ground asserted for relief was not a denial of constitutional rights, but rather, an assertion that in completing the agreement that terminated the state court actions brought under Federal Employers' Liability Act, that the federal statute was not respected; having elected to proceed in the first instance in a state court, it was to that court that those plaintiffs must return for any relief to which they may be entitled. Federal Employers' Liability Act §1 *et seq.*, as amended, 45 U.S.C.A. §51 *et seq.*

Barry M. Simpson, Brennan, Robins & Daley, Pittsburgh, Pa., for appellants.

Benjamin W. Boley, William F. Sheehan, David M. Brenner, Shea & Gardner, Washington, D.C., Michael W. Burns, Joseph S.D. Christof, Dickie, McCamey & Chilcote, Pittsburgh, Pa., for appellee.

Before ALDISERT, Chief Judge, and WEIS and ROSENN, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Chief Judge.

In this case of first impression, we must decide whether plaintiffs have presented a claim for which relief could be granted in seeking to have a federal district court reopen Federal Employers' Liability Act cases originally brought, and thereafter settled, in the Pennsylvania state courts. Prior to payment of the

agreed upon settlement amount, the defendant railroad deducted from that amount premium payments it had made on behalf of each plaintiff under supplemental insurance programs. Plaintiffs, believing such deductions improper, instituted the present action to recover same. The district court denied relief and plaintiffs appealed. We affirm.

I.

The named plaintiffs allegedly suffered personal injuries in the course of their employment with defendant, Consolidated Rail Corporation, and brought damage suits in state court under the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60. Section 51 of FELA provides, in relevant part, that "[e]very common carrier by railroad while engaged in commerce . . . shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of . . . such carrier . . . ." In order to limit the defenses available to defendant railroads, §55 states that

> [a]ny contract, rule, regulation, or device . . . the purpose or intent of which shall be to . . . exempt [the railroad] from any liability created by this chapter, shall . . . be void: *Provided*, That . . . such com- [931] mon carrier may set off therein any sum it has contributed or paid to any insurance . . . that may have been paid to the injured employee. . . .

Thus, by their express terms, §51 allows suit and §55 prevents the raising of potential defenses.

Each of the state court cases initiated by plaintiffs was ultimately discontinued upon proof that a settlement

agreement had been reached. The railroad then deducted from the settlement amounts the disability payments paid to plaintiffs under the supplemental insurance benefit program. Plaintiffs, alleging that these deductions violated §55 of FELA, filed the present class action in the district court below. The complaint asked for a judgment in the amount of the deductions and an order enjoining the railroad from continuing this practice in future settlements. Defendant, arguing that the action was brought under §55, moved under Rule 12(b)(6), F.R. Civ.P., to dismiss the complaint on the grounds that the section "neither establishes nor implies a private cause of action [and] in any event the settlements . . . were not unlawful." Because a favorable decision on defendant's motion would eliminate the need for the substantial expenditures associated with class certification, the parties agreed that the court should decide the dismissal motion first.

The district court agreed with the railroad and concluded that §55 does not create a private cause of action, citing *Bay v. Western Pacific R.R.*, 595 F.2d 514 (9th Cir.1979), and *Fullerton v. Monongahela Connecting R.R.*, 242 F.Supp. 622 (W.D.Pa. 1965). The court was persuaded by the *Bay* rationale that §55 was intended only to allow a FELA plaintiff to avoid a railroad defense based on a contract discharging the carrier from liability. In the words of the *Bay* court, the statute provided a "shield" for the employee but not a "sword" that could be used to bring a separate suit against the railroad. Accordingly, the complaint was dismissed.

On appeal, plaintiffs contend that their case is based on §51, not §55. Appellee responds that the personal injury claims actionable under §51 were extinguished by the

settlements. Appellants' present contentions, appellee argues, are based on intentional acts of the railroad in connection with the settlements, not negligent conduct causing bodily injury that is the sole basis of liability under §51. We must inquire, therefore, whether any relief is now available to appellants under §51.

II.

[*1, 2*] Preliminarily, we note that even though FELA provides for concurrent state and federal court jurisdiction, 45 U.S.C. §56, it is firmly established that the substantive aspects of such litigation are governed by federal law. *See, e.g., Lukon v. Pennsylvania R.R.*, 131 F.2d 327, 329 (3d Cir.1942); *see also Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952). Also, in interpreting the Act, it is important to bear in mind that it was enacted in "response to the special needs of railroad workers." *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, 329, 78 S.Ct. 758, 761, 2 L.Ed.2d 799 (1958), and should be construed liberally for the protection of railroad employees. *Sowards v. Chesapeake and Ohio Ry.*, 580 F.2d 713, 714 (4th Cir.1978); *Lukon*, 131 F.2d at 329. Further, we note that the Act is a statutory mechanism designed to give injured railroad employees a federal right to sue "in commerce" railroad employers for what would otherwise be a common law action for negligently inflicted tortious damages. Finally, although the Act is a federal counterpart to state worker's compensation laws, it allows for more generous remedies to injured workers.

One element of a *prima facie* case brought under §51, therefore, is the averment of negligence, and, to reverse the grant of a 12(b)(6) motion, appellants must show that

there is some set of facts that they could prove at trial to support such an averment. If we were to view the present suit as representing a new claim based on appellee's unilateral reduction of the agreed upon settlement figure, we would [932] have serious doubts whether appellants would be able to make out the requisite levels of proof. First, the injury complained of is economic, not tortious; second, the behavior of the railroad in effecting the deduction of insurance benefits was deliberate, not negligent; and third, the basis for claiming that the railroad's actions were illegal is the violation of a federal statutory provision and is not grounded in the common law. Characterized as such, we would have difficulty asserting that, regardless of the additional facts appellants might be able to prove at trial, the injury for which they seek to recover is tortious, arising from Conrail's negligence.

But appellants, perhaps anticipating these difficulties, try to characterize their action as one arising from the alleged tort that formed the basis of their original state court suits. They assert that the "claims [presented herein] are not new claims arising under a new cause of action . . .," but rather relate back to the original injuries. Brief for Appellant at 10. Further, they contend that they are not seeking some new or additional recovery, but only the "restoration of damages that they were lawfully entitled to under [their original] §51" FELA claims. *Id.* at 13.

Viewed as such, what appellants are seeking is federal review of a settlement agreement that terminated previously instituted FELA suits. Because the interpretation of such an agreement, even if performed in state court, would be a question of federal law, federal

question jurisdiction is available to allow them entry into our courts. *Imm v. Union R.R.*, 289 F.2d 858 (3d Cir.1961). But that does not end our inquiry. As noted above, the settlement that appellants challenge was the direct result of, and formed the basis for discontinuing, several state court FELA suits, and the claims presented in the appeal before us are not new claims but stem from the injuries that formed the basis of those same state court actions. Thus, to be able to review the legality of the settlement and to afford appellants, and the class they represent, the relief demanded, we are essentially being asked to take over where the discontinued state actions left off.

[3] It is well settled that a federal court has the inherent power to enforce and to consider challenges to settlements entered into in cases originally filed therein. *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir.1975), *cert. denied*, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762 (1976). Typically, the court does this without inquiring into, or requiring, an independent basis of subject matter jurisdiction for the enforcement/challenge suit. *See Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976). *But see Fairfax Countywide Citizens Ass'n v. County of Fairfax*, 571 F.2d 1299 (4th Cir. 1978) (when settlement is not contained in district court's order dismissing original action subsequent enforcement suit filed in same court requires an independent jurisdictional basis).

[4] But, that is not the question presented to us today. The issue before us is whether the federal courts have, or should exercise, authority to reopen, by collateral means, private law suits brought and settled in

the state court system, where the grounds asserted for relief are not a denial of constitutional rights, but rather an assertion that in completing the agreement that terminated the state court actions brought under federal law, a certain federal statute was not respected. To state the issue is to answer it. Having elected to proceed in the first instance in a state court, it is to that court that these appellants must return for any relief to which they may be entitled. As stated in *Lee v. Hunt*, 483 F.Supp. 826, 832 (W.D.La. 1979), *aff'd*, 631 F.2d 1171 (5th Cir.1980), where venue was challenged by a party contesting the validity of a court approved settlement, "judicial economy and the policy favoring settlement as an end to litigation require that settlement agreements be enforced in the same court in which the [original] litigation was pending."[1]

III.

Accordingly, the judgment of the district court will be affirmed.

WEIS, Circuit Judge, dissenting.

I agree with the majority that the interpretation of a settlement agreement in a FELA suit is a matter of federal law, *Dice v. Akron, Canton, & Youngstown Railroad*, 342 U.S. 359, 361-62, 72 S.Ct. 312, 314-15, 96 L.Ed. 398 (1952), and that federal courts have

[1] Appellants can find no assistance in *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942), or *Hogue v. Southern R.R.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968). These cases stand for the proposition that if the plaintiff enters into a release prior to filing the FELA suit he need not tender back to the defendant the consideration received in order to sue. Neither case deals with a release or settlement arrived at under a state court FELA proceeding followed by a subsequent suit filed in federal court.

jurisdiction over cases such as the one at hand, *Imm v. Union Railroad*, 289 F.2d 858 (3d Cir.1961). I dissent because I cannot agree with the majority's determination that plaintiffs must bring their action in the state court. Moreover, although the point is not squarely addressed by the majority, I would conclude that the district court erred in dismissing the complaint for failure to state a cause of action.

The district court did not view the case as a dispute over the settlement of a personal injury claim, but rather as one based solely on section 55 of the FELA, 45 U.S.C. §55. In finding no cause of action under that provision, the court relied on two cases, *Bay v. Western Pacific Railroad*, 595 F.2d 514 (9th Cir.1979), and *Fullerton v. Monongahela Connecting Railroad*, 242 F.Supp. 622 (W.D.Pa.1965).

Those cases are distinguishable from the case at hand. Unlike the situation presented here, the plaintiffs in *Bay* and *Fullerton* sought relief beyond that available under section 51. Their claims were not for damages attributable to physical injuries caused by railroad negligence.

In *Fullerton*, the plaintiff alleged a conspiracy to prevent him from recovering in another FELA suit. Damages were sought for, *inter alia*, defamation of character, emotional distress, and invasion of privacy. These claims were triggered by the conduct of a railroad agent investigating the plaintiff. The *Fullerton* court correctly concluded that because the claims were not based on negligence, they did not come within the scope of section 51. In addition, the court stated, without discussion, that section 55 did not create a "civil cause of action." 242 F.Supp. at 626.

Similarly, the plaintiff in *Bay* did not seek recovery for a work-related injury. He asserted that his discharge from employment, allegedly for refusing to settle a FELA suit, violated section 55. The court cited *Fullerton*, noting that it was the "only reported decision dealing specifically with the question." 595 F.2d at 516 n. 4. Finding no evidence of congressional intent to allow a separate recovery under section 55, the *Bay* court concluded that the section's legislative purpose was to protect against a railroad defense that the employee had contracted away the right to sue. Section 55, the court stated, "was not intended to afford a cause of action, separate from that for recovery of damages for injury under FELA." 595 F.2d at 516. *See also Landfried v. Terminal Railroad Assoc. of St. Louis*, 721 F.2d 254, 256 (8th Cir.1983) (no cause of action under section 55 for retaliatory discharge), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1712, 80 L.Ed.2d 185 (1984).

In contrast to *Bay* and *Fullerton*, plaintiffs in this case do not seek damages separate and apart from, or in addition to, those available for the personal injuries covered by section 51. The plaintiffs' position is that they did not receive the full amount of damages set by the section 51 settlement because of the railroad's violation of section 55. The parties' position would be the same if plaintiffs had obtained a verdict in a section 51 action against the railroad which then applied the same setoff it in- [934] vokes here. *Cf. Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir.1984); *Russo v. Matson Navigation Co.*, 486 F.2d 1018 (9th Cir.1973); *Thomas v. Penn Central Co.*, 379 F.Supp. 24 (W.D.Pa.1974).

That the claims at bar are within the scope of the Act is further evinced by the repeated instances in which similar challenges to settlements have been brought in section 51 actions. Instead of directly challenging the settlement, plaintiffs could have brought a personal injury action under section 51. The railroad's defense of settlement could then be countered, as in *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942), with the allegation that the settlement violated section 55. *See also Hogue v. Southern Railway Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968). In a similar vein, the posture of the litigation here is akin to those cases where enforcement of a FELA settlement is sought. *Good v. Pennsylvania Railroad*, 384 F.2d 989 (3d Cir.1967). *See also Napier v. Chesapeake & Ohio Railway Co.*, 582 F.2d 1344 (4th Cir.1978).

In *Bay*, the court relied on a congressional report to the "nearly identical predecessor of §55, §5 [of the Employer's Liability Act of 1908]." 595 F.2d at 515-16. That legislative history does not suggest that plaintiffs here fail to state a cause of action. The purpose of section 5 was to "make effective" the liability provision now represented by section 51. H.R.Rep. No. 1386, 60th Cong., 1st Sess. 6 (1908), *quoted in Cavanaugh v. Western Maryland Railway Co.*, 729 F.2d 289, 292 (4th Cir.1984). Section 5 was viewed as "render[ing] void any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act." H.R.Rep. at 6.

Here, plaintiffs want to complete their recovery under section 51 by challenging a setoff to the settlement of that claim as contravening section 55. Plaintiffs, in effect, seek to void the railroad's alleged improper

attempt to partially exempt itself from its agreed to liability under section 51. A suit on that basis is within the expectations of the legislation.

I therefore differ with the district court's reasoning, and conclude that plaintiffs have properly stated a cause of action.

I come then to the majority's thesis that having elected to proceed in the first instance in the state court, plaintiffs must return there to obtain relief. Although somewhat appealing on first reading, further reflection reveals serious flaws with this rationale.

I assume that if plaintiffs had settled their claims without ever filing suit, the majority would concede that the district court should adjudicate the dispute at hand. Nothing in the majority opinion gives any indication to the contrary, and it does admit that federal question jurisdiction may be invoked. That being so, the filing of the state court suit is the critical factor leading the majority to opt for what may be considered a policy akin to abstention.

Because the validity of the settlement is a matter of federal statutory law and restraint of state proceedings is not sought, the three traditional bases for abstention set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814-16, 96 S.Ct. 1236, 1244-45, 47 L.Ed.2d 483 (1976), are not applicable here.[1]

[1] The Court summarized the three traditional categories of abstention as (a) " 'cases presenting a federal constitutional issue which might be mooted . . . by a state court determination of pertinent state law:' " (b) cases presenting "difficult questions of state law" that bear on "state efforts to establish a coherent policy with respect to a matter of substantial public concern:" and (c) cases where "federal jurisdiction has been invoked for the purpose of restraining state criminal" and other types of state proceedings. 424 U.S. at 814-16, 96 S.Ct. at 1244-45 (citations omitted); *see also Kruse v. Snowshoe Co.*, 715 F.2d 120, 122 (4th Cir.1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1413, 79 L.Ed.2d 739 (1984).

The Court has also articulated a narrow fourth category based on "considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.* at 817, 96 S.Ct. at 1246, (quoting *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, [935] 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)). In explaining this standard, the Court observed that the pendency of a state proceeding is generally " 'no bar to proceedings concerning the same matter in the Federal Court' " and emphasized the "unflagging obligation" of a federal court to exercise its jurisdiction. *Id.* 424 U.S. at 817, 96 S.Ct. at 1246 (quoting *McClellan v. Carland*, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed. 762 (1910)). Nevertheless, "exceptional" circumstances permit the "dismissal of a federal suit due to the presence of a concurrent state proceeding." *Id.* 424 U.S. at 818.

The *Colorado River* principles were reaffirmed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), where the Court stated that "the task is to ascertain whether there exist 'exceptional' circumstances, [and] the 'clearest of justifications' . . . to justify the *surrender* of [federal] jurisdiction." *Id.* at _____, 103 S.Ct. at 942. *See also Arizona v. San Carlos Apache Tribe*, _____ U.S. _____, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). A number of factors are to be considered in this analysis, including convenience of the forum, avoidance of piecemeal litigation, and sequence in which jurisdiction was obtained. 460 U.S. at _____-_____, 103 S.Ct. at 937-943.

"[T]he presence of federal-law issues must always be a major consideration weighing against surrender." *Id.* at _____, 103 S.Ct. at 942.

In the case at hand, no parallel action is presently pending in the state court. The personal injury suit brought there was dismissed, presumably on agreement of the parties. Thus, the relief plaintiffs request from the federal court will in no way affect the state court's disposition of its case which has long been closed. In short, the risks associated with piecemeal or duplicative litigation are nonexistent in this case. Moreover, deference to a state proceeding is not favored here because federal law provides the rule of decision on the merits. *See id.* at _____ & n. 32, 103 S.Ct. at 942 & n. 32.

Considerations of comity were not implicated in *Colorado River*, 424 U.S. at 817, 96 S.Ct. at 1246 and are not usually applicable when the state proceedings are completed, *see Garden State Bar Association v. Middlesex County Ethics Committee*, 687 F.2d 801, 803 (3d Cir.1982). A different situation might be presented where there is judicial participation, whether formal or informal, in the settlement of a state court suit. *See Fleeger v. Clarkson Co.*, 86 F.R.D. 388, 393 (N.D.Tex.1980) (comity counsels dismissal of suit challenging court-approved settlement in course of Canadian receivership process); *cf. In re Grand Jury Proceedings (Wright II)*, 654 F.2d 268, 277-79 (3d Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981); *Ungar v. Mandell*, 471 F.2d 1163 (2d Cir.1972). The record in this case, however, does not demonstrate any judicial intervention in the state court settlements. By contrast, in the case cited by the

majority, *Lee v. Hunt*, 483 F.Supp. 826 (W.D.La.1979), *aff'd*, 631 F.2d 1171 (5th Cir.1980), claims were settled after several days of trial, with the active participation and supervision of the trial judge. No such circumstances are alleged here. For all the record reveals, the claims were settled without judicial intervention.

In sum, the mere fact that plaintiffs filed and settled a suit in the state court is not such an "exceptional" circumstance that a federal court should decline to hear this dispute. On the record before us, the state court had little more involvement than if the parties had settled the claim before filing suit.

I am not persuaded that a federal court can decline to adjudicate in this case, and therefore I dissent from the affirmance of the district court's dismissal.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-5666

PAUL F. FOX and MORRIS S. EXLER on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corp. and who while employees obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement,

Appellants,

vs.

CONSOLIDATED RAIL CORPORATION, themselves and on behalf of all other railroads comprising the National Carriers Conference Committee and participating in the National Supplemental Sickness Benefit Plan issued by Provident Life and Accident Insurance Company.

(D.C. Civil No. 83-0362)

On Appeal from the United States District Court
for the Western District of Pennsylvania

Present: ALDISERT, *Chief Judge*,
WEIS and ROSENN, *Circuit Judges*

Appendix B—Judgment of the Court of Appeals.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel submitted under Third Circuit Rule 12(6) on April 27, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 30, 1983, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST
SALLY MRVOS
Clerk

July 20, 1984

APPENDIX C

Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-5666

PAUL F. FOX and MORRIS S. EXLER on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corp. and who while employees obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement,

Appellants,

vs.

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for the Western District of Pennsylvania

Present: ALDISERT, *Chief Judge*,
WEIS and ROSENN, *Circuit Judges*

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ATTEST
SALLY MRVOS
Clerk

July 20, 1984

Certified as a true copy and issued in lieu of a formal mandate on August 31, 1984.

Test:
M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

RECEIVED AND FILED
8-31-84 JHY
SALLY MRVOS
Clerk

APPENDIX D

Memorandum Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action No. 83-362

PAUL F. FOX and MORRIS S. EXLER on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corporation and who, while employees obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION, themselves and on behalf of all other railroads comprising the National Carriers Conference Committee and participating in the National Supplemental Sickness Benefit Plan issued by Provident Life and Accident Insurance Company,

Defendant.

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs, Paul F. Fox and Morris S. Exler, institute this Federal Employers' Liability Act (hereinafter referred to as "FELA") action on behalf of themselves

and all other similarly situated persons,[1] who within the six years preceding the filing of this action have settled FELA actions against defendant, Consolidated Rail Corporation.[2] The complaint asserts jurisdiction in this Court pursuant to 28 U.S.C. §1331.

The complaint contains two counts,[3] which are both based on a particular provision of the FELA, 45 U.S.C. §55 (hereinafter referred to as "§55"). That section provides as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

According to the plaintiffs, in FELA actions over the six-year period preceding the filing of this action, the defendant and other railroads have routinely deducted

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[1] The complaint is filed as a class action, but the Court has not ruled on plaintiffs' motion for class certification and will not have to rule on the same in light of the holding of this Opinion.

[2] The defendant is sued as a class representative of all railroads similarly situated under Fed. R. Civ. P. 23(a). Complaint, ¶4 (docket entry No. 1).

[3] Count One seeks a monetary award, while Count Two seeks injunctive relief.

the amount of benefits previously paid to the plaintiffs under a supplemental sickness benefit program from settlement and payment awards. Plaintiffs further assert that the certificates of settlement issued in said cases (*see* Complaint, Exhibits A and B (docket entry No. 1)) make it appear that the amounts deducted from the settlement figure for previously paid supplemental sickness benefits were reimbursed to third parties, when, in fact, plaintiffs later discovered that those amounts were retained by the defendant. The plaintiffs contend that the retention of said benefits serves to unjustly enrich the defendant and to violate the aforementioned §55. The complaint requests the following relief: (1) that the Court issue an order certifying this action as a proper class action; (2) that the Court declare that the deductions for supplemental sickness benefits from the settlement amounts be declared improper deductions under §55; (3) that the Court issue a judgment in favor of the plaintiffs, and all class members, for an amount equal to the supplemental sickness benefits deducted from the settlement amounts; (4) that the Court enjoin the defendant from making such deductions in the future; (5) that the Court award plaintiffs' attorney's fees, costs, and expenses of this action; and (6) that the Court retain jurisdiction over this matter in the future to insure compliance with the requested money judgments and injunctive relief.

Defendant has filed a Fed. R. Civ. P. 12(b)(6)[4] motion to dismiss, asserting that the complaint should be

[4] Fed. R. Civ. P. 12(b)(6) provides as follows: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....."

dismissed for failure to state a claim upon which relief can be granted. Specifically, the defendant's motion asserts that §55 cannot serve as the basis for a private cause of action, and, alternatively, that the settlements that plaintiffs seek to reopen were not unlawful under §55. For the reasons set forth below, the Court hereby grants defendant's motion.[5]

[5] The Court is aware of the United States Supreme Court decision in *Eisen v. Carlilse Jacquelin*, 417 U.S. 156 (1974), which involved the question of whether the costs of notifying class action plaintiffs could be shifted to the defendant. The Supreme Court held that the costs of notice could not be shifted and found that the district court improperly conducted a preliminary hearing on the merits of the action in order to determine whether it could be maintained as a class action. *Id.* at 177. In the eyes of the Supreme Court, the hearing contravened Rule 23 "by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it." *Id.* Several later decisions construed the *Eisen* decision to prohibit any decision on the merits prior to, or simultaneously with, a decision on class certification and the sending of notice to the class. *See, e.g., Horn v. Assoc. Wholesale Grocers, Inc.*, 555 F.2d 270, 273-275 (10th Cir. 1977); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 352-354 (7th Cir. 1975). However, this Court takes note of two other decisions, including one decision of this Court, which have held that a Court may consider the merits of plaintiffs' case in a class action, by ruling on a motion to dismiss or motion for summary judgment, prior to ruling upon a motion for class determination or requiring that notice be sent to the class. *Postow v. OBA Fed. Sav. & Loan Ass'n.*, 627 F.2d 1370, 1381-1382 (D.C. Cir. 1980); *Haas v. Pittsburgh Nat'l. Bank*, 381 F. Supp. 801, 802-805 (W.D. Pa. 1974), *modified on other grounds*, 526 F.2d 1083 (3d Cir. 1975). *See also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 759-762 (3d Cir.), *cert. denied*, 419 U..S. 885 (1974). As the *Haas* Court stated, the Court may rule on such motions to avoid a potentially needless expenditure of court time and plaintiff's money. Here, on the basis of the *Haas* opinion, the plaintiffs moved, pursuant to Fed. R. Civ. P. 12(d), the Court for a ruling on defendant's motion to dismiss prior to a ruling on the motion for class certification and sending of notice. (Docket entry No. 25). The plaintiffs requested the earlier disposition of defendant's motion because discovery on the size of the class, the potential scope

(Footnote continued on following page.)

When confronted with a motion to dismiss, the Court must construe all allegations in the complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Melo-Sonics Corp. v. Cropp*, 342 F.2d 856, 858 (3d Cir. 1965). As the United States Supreme Court has stated:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely by that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer, 416 U.S. at 236. The Supreme Court has further stated that "a complaint should not be dismissed for

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(Footnote continued from preceding page.)

of damages, and the nature and extent of violations will cost approximately $25,000, and plaintiffs do not want to spend said sum and later have the case dismissed. The defendant's response to plaintiffs' 12(d) motion asserts that it does not object to the earlier disposition of the motion (docket entry No. 27), which is an important consideration because, in such a situation, "the defendants assume the risk that a judgment in their favor will not protect them from subsequent suits by other potential class members, for only the slender reed of stare decis stands between them and the prospective onrush of litigants." *Postow*, 627 F.2d at 1382; *Haas*, 381 F. Supp. at 805. Accordingly, the Court deems it appropriate to rule on the motion to dismiss at this point in the case.

failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). These statements guide the Court in its review and discussion of defendant's motion.

As stated above, the defendant moves to dismiss the complaint on two grounds. The Court finds that §55 does not create a private cause of action and grants defendant's motion on that basis. Therefore, this Opinion will focus strictly on that contention and not discuss defendant's second claim—that the settlements the plaintiffs seek to reopen were not unlawful under §55. In support of its motion, defendant cites the Court to the only two cases on point, *Bay v. Western Pacific Railroad Co.*, 595 F.2d 514 (9th Cir. 1975) and *Fullerton v. Monongahela Connecting Railroad Co.*, 242 F. Supp. 622 (W.D. Pa. 1965). Both cases clearly state that §55 was not intended to create a private cause of action such as that asserted by the plaintiffs, with the *Fullerton* Court making the bald statement under a rather cursory treatment and the *Bay* Court issuing a more detailed Opinion based on the legislative history of §55 and several United States Supreme Court cases. The Court finds these two cases, especially *Bay*, to be persuasive and, therefore, grants defendant's motion.

In the *Fullerton* Opinion, Judge Gourley of this Court set forth the text of §55 and then stated as follows:

> There is no basis for plaintiff's contention that this section creates a civil cause of action. Therefore, the claims based on the provisions of the Federal

> Employers' Liability Act must be dismissed for failure to state a claim upon which relief can be granted.

Fullerton, 242 F. Supp. at 626.

In the more comprehensive and persuasive *Bay* Opinion, the Ninth Circuit specifically addressed the issue of whether §55 creates a private cause of action. The *Bay* Court clearly and unequivocally held that §55 does not create a private cause of action, stating as follows:

> On its face §55 does not create a private cause of action. Instead, the legislative history of the bill containing the nearly identical predecessor of §55, §5, establishes that Congress' purpose in enacting §5 was to create a "shield" against a railroad's defense that an employee had contracted away his right to sue the railroad for personal injuries and not to provide a "sword" for a separate suit against the railroad. Congress indicated that it wished to "void" contracts "discharging the company from liability for personal injuries"; such contacts had become almost a standard practice in the railroad industry. S.Rep.No. 1386, 60th Cong., 1st Sess., 6 (1908). Congress also noted that although many states had held such contracts unenforceable as a defense to an employee's action, the United States Supreme Court had found such a contract a good defense because there was no federal statute invalidating the contract. *Id.* at 7. Finally, the congressional report suggested that the federal law under §5 would correspond with the law in those

> states that made such contracts "invalid, and...no defense to an action against" a railroad for injuries to an employee. *Id.* The report makes no mention of §5 authorizing a separate suit against a railroad because it undertook a device or entered into an unenforceable contract.[6]

Bay, 595 F.2d at 515-516 (footnote omitted). Moreover, the *Bay* Court reviewed two United States Supreme Court cases, *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949) and *Philadelphia, Baltimore & Washington Railroad Co. v. Schubert*, 224 U.S. 603 (1912), which specifically stated that §55 was intended by Congress to bar waiver defenses raised by a railroad. *Id.* at 516. Accordingly, the Ninth Circuit concluded that §55 was intended to bar a defense based upon an employee's relinquishment of rights under the FELA and not intended to create a private cause of action.

The Court finds the *Bay* Opinion persuasive and relies on it in dismissing plaintiffs' claim. The plaintiffs raise, and the Court acknowledges, the fact that the *Fullerton* and *Bay* cases are factually dissimilar from the case at hand; however, despite this factual dissimilarity, the holdings of these Courts as to the issue of whether §55 creates a private cause of action are clear and unequivocal. The holdings in *Fullerton* and *Bay* are not qualified by the Courts based on the facts. Thus,

---

[6] The Court notes that plaintiffs' brief in opposition to the motion to dismiss does not cite any cases in support of their position that §55 creates a private cause of action. Plaintiffs do cite the Court to *Hall v. Minnesota Transfer Railway Co.*, 322 F. Supp. 92 (D. Minn. 1971) and several other cases involving the application of the "collateral source" rule in pending FELA actions, but those cases do not hold that §55 creates a private cause of action.

although the Court is aware that it should be hesitant to dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, the Court finds that this is an appropriate case for dismissal because the statutory provision upon which plaintiffs base their claims[7] cannot serve as the basis for a private cause of action. Accordingly, the complaint truly does not state a claim upon which relief can be granted.

An appropriate Order will be issued.

Date: 8/30/83

ALAN N. BLOCH
United States District Judge

cc: Counsel of record.

[7] It is clear from the complaint that both counts are based on §55: therefore, it is appropriate to dismiss the entire complaint on the same ground.

APPENDIX E

Judgment Order

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action No. 83-362

PAUL F. FOX and MORRIS S. EXLER on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corporation and who, while employees, obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION, themselves and on behalf of all other railroads compromising the National Carriers Conference Committee and participating in the National Supplemental Sickness Benefit Plan issued by Provident Life and Accident Insurance Company,

Defendant.

JUDGMENT ORDER

AND NOW, this 30th day of August, 1983, upon consideration of Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted filed in the above captioned matter on April 5, 1983,

Appendix E—Judgment Order.

IT IS HEREBY ORDERED that said Motion is GRANTED.

ALAN N. BLOCH
United States District Judge

cc: Barry M. Simpson, Esquire
1900 Commonwealth Building,
Pittsburgh, PA 15222.

Joseph S. D. Christof, II, and
Michael W. Burns, Esquires
3180 U.S. Steel Building, Pittsburgh, PA 15219.

Benjamin W. Boley, Esquire
1800 Massachusetts Avenue, N.W.,
Washington, DC 20036.

CLERK'S OFFICE
United States District Court
For The

Civil Action No. 83-362

Paul F fox, *etal*

vs.

Consolidated Rail Corp. *etal*

There was entered on the docket Aug 30, 1983, an order (judgment).

(Illegible), CLERK

APPENDIX F

Complaint—Class Action

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

No. 83-362
Complaint--Class Action
JURY TRIAL DEMANDED

PAUL F. FOX and MORRIS S. EXLER on behalf of themselves and all other similarly situated persons who within six years before the filing of this action were employees of Consolidated Rail Corporation and who while employees, obtained settlements with the Defendant in which supplemental sick payments were setoff against the settlement,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION, themselves and on behalf of all other railroads comprising the National Carriers' Conference Committee and participating in the National Supplemental Sickness Benefit Plan issued by Provident Life and Accident Insurance Company,

Defendant.

Appendix F—Complaint—Class Action.

COMPLAINT—CLASS ACTION

Plaintiffs, by their attorneys, Barry M. Simpson, Esquire, John Daley, Esquire, and Brennan, Robins & Daley, for themselves and all other members of the class hereinafter described allege:

JURISDICTION

1. The jurisdiction of this Court arises under the laws of the United States and in particular, Title 28 United States Code §1331.

PARTIES

2. The named Plaintiffs are citizens of the Commonwealth of Pennsylvania.

DEFENDANT

3. The Defendant, Consolidated Rail Corporation, is a corporation having one of its offices and place of business in the City of Pittsburgh and Commonwealth of Pennsylvania, within the territorial jurisdiction of this Court, and is engaged in the business of a common carrier of freight for hire and by rail, and is engaged in interstate commerce.

CLASS ACTION ALLEGATIONS

4. This action is brought by Plaintiffs as a class action on their own behalf and on behalf of all others similarly situated and against the Defendant as a class representative of all railroads similarly described under the provisions of Rule 23(a) of the Federal Rules of Civil Procedure.

Appendix F—Complaint—Class Action.

DAMAGES INJUNCTIVE AND DECLARATORY RELIEF AND RELIEF INCIDENT AND SUBORDINATE THERETO INCLUDING COSTS. EXPENSES AND ATTORNEYS FEES.

5. The class so represented by Plaintiffs in this action and of which Plaintiffs are themselves members consists of all employees or former employees of Defendant Corporation during the period of six (6) years prior to the institution of this action who, under Title 45 of the United States Code §51 *et seq.* more commonly and popularly known as The Federal Employers Liability Acts (FELA), April 22, 1908, CH 149, §1, 35 STAT. 65; August 11, 1939, CH 685, §1, 53 STAT. 1404) made claims and/or filed actions against the Defendant Corporation for recovery of damages as therein provided for under the FELA, and to which the Defendant Corporation setoff against settlements and/or awards under said actions, supplemental sick benefits provided under the terms of its supplemental sickness benefit plan.

6. The class so represented by the Defendant in this action of which Defendant is a member, consists of all railroads comprising the National Carriers Conference Committee and participating in the National Supplemental Sickness Plan issued by Provident Life and Accident Insurance Company under Group Policy No. R-5000.

7. The exact number of members of each of the respective classes, as herein above identified and described, is not known to Plaintiffs, but it is estimated that they are so numerous that joinder of individual members herein is impracticable.

8. There are common questions of law and fact in the action that relate to and affect the rights of each member of the respective classes and the relief sought is common to the entire respective classes, namely:

a. Whether the action by Defendant Corporation in setting off supplemental sick benefits from final settlements and/or awards is in violation of and in contravention of Title 45 USC §55 (April 22, 1908, CH 149, §5, 35 STAT. 66.)

b. Whether the Defendant Corporation and other members of its class have uniformally followed that practice in all settlements and/or awards in claims made or actions filed under Title 45 USC §51, *et seq.* as aforementioned.

c. Whether pursuant to Title 45 USC §55 as aforementioned the Defendant Corporation and other members of its class are entitled to any setoff in any sum as a result of any benefits provided under insurance with the Provident Life and Accident Insurance Company under group policy number R-5000 or any other insurance policy provided by any other insurance carrier within the time period complained of herein.

9. The claims of Plaintiffs, who are representatives of the class herein, are typical of the claims of the class in that the claims of all members of the class including Plaintiffs depend on a showing of the acts of the Defendant Corporation in applying the setoffs aforementioned, giving rise to the right of Plaintiffs to the relief sought herein. There is no conflict as between any individual named Plaintiff and other members of the class with respect to this action, or with respect to the claims for relief herein set forth.

10. The named Plaintiffs are the representative parties for the class and are able to and will fairly and adequately protect the interest of the class. The attorneys for Plaintiffs are experienced and capable in litigation and have successfully represented claimants in other litigation. Of the attorneys designated as counsel for Plaintiffs, Barry M. Simpson, Esquire, and John Daley, Esquire, will actively conduct and be responsible for Plaintiffs' case herein.

11. This action is properly maintained as a class action under Rule 23(b)(1)(B) in that the prosecution of separate actions by individual members of the Plaintiffs' class would create a risk of adjudications with respect to individual members of each of the classes, which would as a practical matter be dispositive of the interests of other members not parties to the adjudication, or substantially impair or impede their ability to protect their interests.

12. The Defendant, Consolidated Rail Corporation, a participant in the National Carriers Conference Committee of Washington, D.C., and a participant in the National Supplemental Sickness Benefit Plan under Group Policy No. R-5000 of Provident Life and Accident Insurance Company of Chattanooga, Tennessee, is an adequate representative of the class.

FIRST COUNT

13. The Plaintiff, Paul F. Fox, while an employee of Consolidated Rail Corporation, was last injured on January 18, 1978, while in the performance of his duties. As a result he filed actions in the Court of Common Pleas of Allegheny County, against the Defendant at No. GD 77-30500, GD 77-30501, and GD 79-26546. Following

the filing of said action a settlement in the amount of Seventeen Thousand ($17,000.00) Dollars was agreed on by and between the Plaintiff and Defendant as evidenced by the Certificate of Settlement, a copy of which is attached hereto and designated Exhibit "A".

14. A deduction from the total settlement was set forth on said Certificate of Settlement on behalf of "Provident Supplement Sick Lien" in the amount of One Thousand and 48/100 ($1,000.48) Dollars. While it would appear from the settlement statement that those monies are reimbursed to Provident, in fact those funds are kept by the Defendant, Consolidated Rail Corporation, all of which results in unjust enrichment to the Defendant and is in violation of and contravention of Title 45 USC §55 as aforementioned.

15. The Plaintiff Morris S. Exler was injured on April 26, 1976, while an employee acting within the scope of his employment and performing his duties for the Defendant as a result of which he filed a claim against the Defendant in the Court of Common Pleas of Allegheny County at No. GD 78-7939.

16. The Plaintiff Morris S. Exler's claim was settled for an amount of Fourteen Thousand Five Hundred ($14,500.00) Dollars from which a deduction for "supplemental sick benefit" in the amount of Two Thousand Ninety-Four and 34/100 ($2,094.34) Dollars was deducted as evidenced by the Certificate of Settlement, a copy of which is attached hereto and designated Exhibit "B".

17. Plaintiffs believe and therefore aver that on all claims or actions filed by employees of Defendant, similarly situated, which concluded by settlement or payment of awards, the Defendants and other members

of the class have routinely and systematically deducted the supplement sick benefit as provided for under the group policy of insurance, issued by Provident, all of which is in violation of Title 45 USC §55.

18. The representative Plaintiffs, Fox and Exler, have made demands for payment of the supplemental sick benefit that has been deducted, but at all times, such demands have been without avail.

SECOND COUNT

19. Plaintiffs incorporate by reference as though fully set forth herein paragraphs 1 through 18.

20. The representative Plaintiffs believe and therefore aver that deductions for the supplemental sick benefit are improper and in violation of Title 45 USC §55.

21. The representative Plaintiffs believe that without an order enjoining Defendants and other members of the class from continuing to require a deduction of supplemental sick benefits that said practices will continue to prevail.

22. The Plaintiff class has no adequate remedy at law.

WHEREFORE, the representative Plaintiffs pray:

a. For an Order determining that this action shall proceed as a class action on behalf of the Plaintiffs' class hereinabove described and on behalf of the Defendant's class hereinabove described and that the appropriate notices be given in the most practicable matter to the members of the classes pursuant to the Federal Rules of Civil Procedure, Rule 23(c)(2).

b. That the rights of the Plaintiffs' class members to the amount of supplemental sick benefits that have been

deducted from any settlement be adjudicated and declared to have been an improper deduction under Title 45 U.S.C. §55.

c. For judgment against the Defendant corporation and all members of its class and in favor of the Plaintiffs and all members of their class in an amount equal to the supplemental sick benefits deducted from any settlements, plus interest at the legal rate from period of deduction to the present time.

d. That the members of the Plaintiffs' class shall include all individuals who attained settlements and had supplemental sick benefit deductions for a period extending from six (6) years prior to the filing of the within action.

e. That the Defendants, and each of them in the class, be enjoined temporarily and permanently from requiring deduction of supplemental sick benefits in all settlements to individuals in the Plaintiffs' class, or in like position to the Plaintiffs' class in the future.

f. That Plaintiffs be awarded their costs and expenses of this action, including reasonable attorneys' fees.

g. That this Court retain jurisdiction of this action for such a period as may be necessary in order to assure compliance with injunctive orders and judgments entered herein and such other relief as the Court may deem just and proper.

BARRY M. SIMPSON
Barry M. Simpson, Esquire
BRENNAN, ROBINS & DALEY

JOHN DALEY
John Daley, Esquire
BRENNAN, ROBINS & DALEY

Appendix F—Complaint—Class Action.

EXHIBIT "A"

Law Offices
GILARDI & COOPER, P.A.
808 Grant Building
Pittsburgh, Pennsylvania 15219

Telephone 391-9770
Area Code 412

CERTIFICATE OF SETTLEMENT

GD 77-30500
GD 77-30501
GD 79-26546

PAUL F. FOX,

Plaintiff.

vs.

PENN CENTRAL TRANSPORTATION,

Defendant.

SETTLEMENT	$17,000.00
Provident Supplemental Sick Lien	1,000.48
Railroad Retirement Board	2,375.00
Net Settlement	$13,624.52
ATTORNEY'S FEE	$ 4,250.00
Dr. Paul Steele—reports	25.00
Mercy Hospital—records	3.00
Blair Orthopedic Associates—reports	25.00
Donald Saluti—deposition	46.55
Court Costs	43.00
Total Attorneys Fees & Expenses	$ 4,392.55
BALANCE TO PAUL F. FOX	$ 9,231.97

I hereby certify the above figures to be true and correct to the best of my knowledge and I acknowledge receipt of the same.

PAUL F. FOX — R.F.E.
Paul F. Fox — Witness

10-23-80
Date

Appendix F—Complaint—Class Action.

EXHIBIT "B"

Law Offices
GILARDI & COOPER, P.A.
808 Grant Building
Pittsburgh, Pennsylvania 15219

Telephone 391-9770
Area Code 412

CERTIFICATE OF SETTLEMENT

GD 78-7939

MORRIS S. EXLER,

Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,

Defendant.

SETTLEMENT	$14,500.00
Railroad Retirement Board	5,125.00
Supplemental Sick Benefit	2,094.34
Net Settlement	$ 7,277.66
ATTORNEY'S FEES	$ 2,150.00
John F. Peters—back brace	66.00
Milton Hershey Medical Center—records	7.50
Earl J. Schwartz—investigation	15.00
Mercy Hospital, Altoona—records	8.50
Dr. David Huber—reports	95.00
Dr. David Steele—reports	50.00
Robert Bowman & Assoc.—photography	281.05
Total Attorneys' Fees & Expenses	$ 2,673.05
BALANCE TO MORRIS S. EXLER	$ 4,604.61

I hereby certify the above to be true and correct to the best of my knowledge and I acknowledge receipt of the same.

_____ _____

Witness Morris S. Exler

3-24-81
Date

APPENDIX G

Motion of Defendant Consolidated Rail Corporation to Dismiss the Complaint for Failure to State a Claim on Which Relief May Be Granted

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

No. 83 362

PAUL F. FOX and MORRIS S. EXLER, *et al.*,
Plaintiffs.

v.

CONSOLIDATED RAIL CORPORATION, *et al.*,
Defendants.

MOTION OF DEFENDANT CONSOLIDATED RAIL CORPORATION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

Defendant Consolidated Rail Corporation ("Conrail") hereby moves the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the Complaint herein on the ground that it fails to state a claim upon which relief can be granted.

The Complaint challenges settlements in past cases brought against Conrail by its employees under the Federal Employers Liability Act, 45 U.S.C. §§51-60 (1976) ("FELA"). The Complaint alleges that the agreed-upon settlement amounts paid to the plaintiffs reflected a reduction, in violation of Section 5 of the FELA, 45

Appendix G—Motion of Defendant Consolidated Rail Corporation to Dismiss the Complaint for Failure to State a Claim on Which Relief May Be Granted.

U.S.C. §55 (1976), for the benefits previously paid to the plaintiffs under a supplemental sickness benefit program maintained by Conrail and other railroads for certain of their employees. Section 5 generally outlaws "contracts" or "devices" that would allow a railroad to exempt itself from FELA liability.

The grounds for this motion, as more fully set forth in the accompanying memorandum, are: (a) as this Court has held, Section 5 was meant by Congress to be a shield, not a sword, and neither establishes nor implies a private cause of action, and (b) in any event the settlements that plaintiffs seek to reopen were not unlawful under that section.

Respectfully submitted,

BENJAMIN W. BOLEY
Benjamin W. Boley
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

(Illegible)
Michael W. Burns and Joseph S.D. Christof, II
Dickie, McCamey & Chilcote
3180 United States Steel Building
600 Grant Street
Pittsburgh, Pennsylvania 15129
(412) 281-7272

Counsel for Consolidated Rail Corporation

April 5, 1983

Appendix G—Motion of Defendant Consolidated Rail Corporation to Dismiss the Complaint for Failure to State a Claim on Which Relief May Be Granted.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

No. 83 362

PAUL F. FOX and MORRIS S. EXLER, *et al.*,
Plaintiffs.

v.

CONSOLIDATED RAIL CORPORATION, *et al.*,
Defendants.

ORDER

Upon consideration of the Motion of Defendant Consolidated Rail Corporation to Dismiss the Complaint for Failure to State a Claim on Which Relief May be Granted and of the Memorandum of Points and Authorities filed in support thereof,

IT IS ORDERED THAT the Complaint in this case is dismissed for failure to state a claim upon which relief may be granted.

UNITED STATES DISTRICT JUDGE

Dated:_____